LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 24 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 371

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

E. H. MILSTEAD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Alabama.

JOHN W. WELDON,
PEYTON D. BIBB,
Counsel for Petitioner, Atlantic Coast Line Railroad Company.

GRAHAM, BIBB, WINGO & FOSTER,
1115 First National Building,
Birmingham, Alabama,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
The opinion below	1
Jurisdiction	2
The questions presented	2
The statute involved	3
Statement of the case	4
Reasons for granting the writ	8
Argument	10
Conclusion	19
Appendix—Document No. 1—Opinion of the Supreme Court of Alabama, May 10, 1962	21
Appendix—Document No. 2—Judgment of the Supreme Court of Alabama, May 10, 1962	34
Appendix—Document No. 3—Order of the Supreme Court of Alabama denying applications for rehearing, June 28, 1962	35
Appendix—Document No. 4—Order of the Supreme Court of Alabama denying petition for injunction, July 30, 1962	36
Appendix—Document No. 5—Summons issued by Circuit Court, Tenth Judicial Circuit of Alabama, August 7, 1962, with Bill of Complaint and Fiat ordering issuance of temporary injunction or restraining order	38
Appendix—Document No. 6—Writ of injunction issued by the Circuit Court, Tenth Judicial Circuit of Alabama, August 7, 1962	44
Appendix—Document No. 7—Notice of special setting, August 3, 1962	45

Cases Cited.

Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768, 72 S. Ct. 1022, 96 L. ed. 1283 (1952) 14

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 93 L. ed. 1528 (1949) 9, 17, 18

Conley v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. ed. 2d 80 15

Dibella v. U. S., ... U. S. ..., 7 L. ed 2d 614 (March, 1962) 9

Order of Railway Conductors of America v. Southern Railway, 339 U. S. 255, 94 L. ed. 811 (1950) 9, 10

Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. ed. 319 14

Pennsylvania Railroad Co. v. Day, 360 U. S. 548, 3 L. ed. 2d 1422 (1959) 9, 11

Sloçum v. Delaware, L. & W. R. Co., 339 U. S. 239, 70 Sup. Ct. 577, 94 L. ed. 795 (1950) 9, 10

Steele v. Louisville & Nashville R. Co., 323 U. S. 192, 89 L. ed. 173, 65 S. Ct. 226 14

Swift & Co. v. Compania Colombiana, 339 U. S. 684, 70 S. Ct. 861, 94 L. ed. 1206 (1950) 9, 16

Statutes Cited.

28 U. S. C. A., Section 1257 (3) 2, 16

28 U. S. C. A., Section 1291 16

45 U. S. C. A., Section 151 et seq 3, 9, 10

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

E. H. MILSTEAD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Alabama.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Atlantic Coast Line Railroad Company, by its attorneys, respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama entered on May 10, 1962.

THE OPINION BELOW.

The opinion of the Supreme Court of Alabama in question, issued May 10, 1962, is reported at 142 So. 2d 705, ... Ala. .... Full, true and correct copy of such opinion is appended hereto (App. p. 21).

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A., Section 1257 (3) to review the judgment in question of the Alabama Supreme Court, since rights are claimed by Petitioner under a statute of the United States. Application for rehearing in the Supreme Court of Alabama (R. 67) was overruled June 28, 1962 (R. 69).[1] Petitioner's "Motion for Stay Pending Application for Review, etc." (R. 73) was denied by order of the Supreme Court of Alabama on July 30, 1962 (R. 77).

THE QUESTIONS PRESENTED.

The questions presented are: (a) Whether a State Court has jurisdiction to hear and determine suits by a railroad employee seeking to declare and fix rights to more favorable seniority standing which requires the interpretation and application of existing collective bargaining agreements relative to rates of pay, rules and working conditions governing the employee's status as a railroad employee, and (b) Is the action of the Supreme Court of Alabama in holding that Alabama Courts have jurisdiction to hear and determine such employee suits hostile to and in violation of the Federal Statutes as interpreted under the decisions of this Court.

The holding of the Alabama Supreme Court that the Alabama Courts have jurisdiction of such suits is epitomized in the syllabus to its opinion as reported (Pages 705-706 of 142 So. 2d) as follows:

> "Dispute arising out of locomotive engineer's assertion that railroads and unions had misconstrued collective bargaining agreement so as to deprive him

[1] References are to pagination of the record as certified by the Clerk of the Supreme Court of Alabama.

of his correct seniority status was not within exclusive jurisdiction of National Railroad Adjustment Board and locomotive engineer could maintain instant action." [Action for damages and declaratory construction of agreement.]

THE STATUTE INVOLVED.

The statute involved is the Railway Labor Act, 45 U. S. C. A., Section 151 et seq., and here, more particularly, 45 U. S. C. A., Section 153 (i) which provides as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

And also the provisions of 45 U. S. C. A., Section 151 (a) (4) and (5), as follows:

> "151 (a) General Purposes. The purposes of the Act are: * * * (4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions."

STATEMENT OF THE CASE.

(a) Procedure and How Federal Question is Presented.

Respondent Milstead instituted suit in the Circuit Court of Jefferson County, Alabama, by complainant (R. 2, as amended R. 46) against petitioner and other defendants, including Grand International Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, his collective bargaining agents. As against Petitioner, Atlantic Coast Line Railroad Company, his employer, **the complaint seeks recovery of damages** for alleged breach of the collective bargaining agreements set out **and** also seeks **declaratory judgment that under the provisions of the existing agreements** Respondent Milstead should be advanced by Petitioner on Petitioner's Engineer's Seniority Roster to a position ahead of four other locomotive engineers who are now carried on the Engineer's Seniority Roster ahead of Respondent Milstead.

Petitioner seasonably filed in the Circuit Court of Jefferson County its Pleas in Abatement (R. 25), particularly Pleas "B", "D", "F" and "H" (R. 25-27), setting up that Respondent (the Plaintiff therein) is and was at all material times an employee of Petitioner, Atlantic Coast Line Railroad Company, and that the controversy stated in the complaint, seeking interpretation and application of agreements made between Petitioner and the Union or Unions representing the class or craft of employees of which Respondent Milstead is a member, was within the primary jurisdiction of the National Railroad Adjustment Board under the provisions of the Railway Labor Act; that Respondent Milstead had not exhausted his administrative remedies by seeking relief from the National Railroad Adjustment Board and thus the Circuit Court of Jefferson County was without jurisdiction to entertain

the suit. The Brotherhoods and one individual defendant filed similar pleas to the jurisdiction raising the same question of primary jurisdiction in the National Railroad Adjustment Board under the provisions of the Railway Labor Act (R. 19, 31 and 22).

The trial court overruled Respondent's demurrers testing the sufficiency of Petitioner's Pleas in Abatement (R. 48). It also overruled demurrers to and likewise held sufficient the Pleas in Abatement of the other defendants (R. 48).

Respondent Milstead declined to plead further and moved for entry of order of non-suit because of the adverse rulings of the trial court (R. 48). From the judgment of the trial court non-suiting Respondent (the plaintiff therein) and dismissing the suit (R. 48), Respondent appealed to the Supreme Court of Alabama. The order of non-suit and dismissal (R. 48) was a complete and final disposition of the suit insofar as the Circuit Court is concerned.

On appeal the only question presented for resolution by the Supreme Court of Alabama as to Petitioner, the current employer of Respondent, was whether jurisdiction to hear and determine the claim presented against Petitioner by Respondent's complaint was exclusively in the National Railroad Adjustment Board under the provisions of the Railway Labor Act or whether the Courts of the State of Alabama had jurisdiction to hear and determine the claim. The Supreme Court of Alabama reversed (R. 56, 66) the action of the trial court sustaining Petitioner's plea to the jurisdiction. The effect of its action is epitomized in the syllabus accompanying the reported opinion (Pages 705 and 706 of 142 So. 2d) as follows:

> "That dispute arising out of locomotive engineer's assertion that railroads and unions had misconstrued

collective bargaining agreement so as to deprive him of his correct seniority status was not within exclusive jurisdiction of National Railroad Adjustment Board and locomotive engineer could maintain instant action." (Action for damages and declaratory construction of agreement.)

Application for Rehearing (R. 67) was overruled June 28, 1962 (R. 69). The judgment of the Alabama Supreme Court on this question of jurisdiction to hear and determine the claim set out in Respondent's complaint against Petitioner is final. It is not subject to review by any other Court except this Court.

(b) **The Facts Material to Questions Presented.**

As shown by the pleadings, Respondent Milstead is now and at all material times has been in the employ of Petitioner, an interstate carrier by railroad, as a locomotive fireman and as a locomotive engineer. Respondent and Petitioner are, and during all material times have been, subject to the provisions of the collective bargaining agreements referred to in the complaint. These agreements were entered into between Petitioner and the two Brotherhoods, who were and are Respondent's collective bargaining agents. The other four locomotive engineers, in the employ of Petitioner, and over whom Respondent Milstead claims the right to be advanced on the seniority roster, are also subject to such agreements.

Only one of these four other engineers (C. C. Griggers) is actually a party to the proceedings below (R. 48). The trial court held (R. 47) that it had no jurisdiction over the other three (W. W. Daniel, W. S. Slaughter and T. T. Jackson, Jr.), they being non-residents and beyond reach of process of the Circuit Court of Jefferson County, Alabama (R. 47).

On, to-wit, the 23rd day of July, 1962, pursuant to the provisions of Title 45, U. S. C. A., Section 153 (h) and (i), Petitioner duly submitted to the National Railroad Adjustment Board, First Division, the dispute between Petitioner and Respondent Milstead (R. 74 and 76) and which involves the basic questions of proper interpretation and application of the provisions of the collective bargaining agreements between Petitioner and the Grand International Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, the bargaining agents of Respondent Milstead, and upon which agreements the disputed claims asserted in Respondent's complaint in the Alabama Courts are bottomed.

Petitioner applied to the Supreme Court of Alabama to stay execution and enforcement of its judgment of May 10, 1962, and any mandate to the Circuit Court of Jefferson County (R. 73) separately (a) to permit Petitioner to apply to this Court for a writ of certiorari and (b) pending action and decision by the National Railroad Adjustment Board upon the dispute between Petitioner and Respondent which had been submitted to it. Petitioner's request for stay in both respects was denied July 30, 1962 (R. 77). Respondent Milstead also filed in the Supreme Court of Alabama his purported "Original Petition for Injunction" (R. 70) asking temporary and permanent injunction requiring Petitioner to refrain from further prosecuting and ultimately to withdraw the proceedings submitting such dispute to the National Railroad Adjustment Board. Immediately after the order of the Supreme Court of Alabama dated July 30, 1962 (R. 77) denying Respondent's "Original Petition for Injunction", Respondent Milstead filed essentially the same "Petition for Injunction" in the Circuit Court of Jefferson County, Alabama, in Equity (App. p. 39), and thereupon on, to-wit, the 6th day of August, 1962, the Circuit Court of Jefferson County, Alabama, in Equity, issued ex parte its

fiat for a temporary injunction (App. p. 42) and formal writ of injunction (App. p. 43) was served on Petitioner August 7, 1962, ordering and directing Petitioner, Atlantic Coast Line Railroad Company, to refrain from further processing, prosecuting or undertaking to obtain action upon the proceedings initiated by Petitioner before the National Railroad Adjustment Board and by which it was duly called upon by Petitioner to resolve and determine the existing dispute between Petitioner and Respondent Milstead.[2]

Pursuant to the opinion and judgment (R. 56, 66) of the Supreme Court of Alabama, the Circuit Court of Jefferson County, Alabama has set Respondent's initial suit at law therein against Petitioner, and here involved, for trial on the merits on September 17, 1962, as shown by notice from the Clerk dated August 3, 1962 (App. p. 45).

REASONS FOR GRANTING THE WRIT.

For the purpose of clarity, a condensed statement of reasons for granting the writ requested is here set forth. These will be expanded in the Argument following.

1. As concerns the claim made by Respondent Milstead against Petitioner, Atlantic Coast Line Railroad Company, the decision and judgment of the Supreme Court of Ala-

---

[2] The only light Petitioner can shed on the apparent procedural anomaly of the trial court's granting the temporary injunction upon contentions apparently previously denied by the Alabama Supreme Court is statement made to the trial judge by counsel for Respondent Milstead on informal presentation of request for temporary injunction that he had inquired of a Justice of the Supreme Court of Alabama regarding the order of that Court of July 30, 1962, denying such "Original Petition for Injunction" (R. 70) and was informed by that Justice that the reason the Supreme Court of Alabama denied the Petition for Injunction was that it was not a matter within the original jurisdiction of the Supreme Court of Alabama.

bama is in direct conflict with and in disregard of the decisions of this Court on the same important federal question.

(a) As regards the claims sought to be adjudicated in the Alabama courts, the opinion and judgment of the Supreme Court of Alabama is in direct conflict with the opinions of this Court in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 70 Sup. Ct. 577, 94 L. ed. 795 (1950); Order of Railway Conductors of America v. Southern Railway, 339 U. S. 255, 94 L. ed. 811 (1950), and Pennsylvania Railroad Co. v. Day, 360 U. S. 548, 3 L. ed. 2d 1422 (1959).

(b) The decision below is a grave emasculation of the provisions of the Railway Labor Act (45 U. S. C. A., Section 151 et seq.), as interpreted and applied under the decisions of this Court. If allowed to stand, the decision below will thwart and frustrate the aims and purposes of a solemn act of Congress in an important area of national interest and will irreparably deprive Petitioner of its rights thereunder.

(c) The opinion below that the courts of the State of Alabama have plenary jurisdiction to entertain and adjudicate the claim made against petitioner is final as respects review by this Court. Swift & Co. v. Compania Colombiana, 339 U. S. 684, 70 S. Ct. 861, 94 L. ed. 1206 (1950); Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 93 L. ed. 1528 (1949); Dibella v. U. S., ... U. S. ..., 7 L. ed. 2d 614 (March, 1962).

ARGUMENT.

That controversies between interstate railroads and present employees involving interpretation and application of existing collective bargaining agreements are by the Railway Labor Act (45 U. S. C. A., Section 151 et seq.) committed to the exclusive jurisdiction of the National Railroad Adjustment Board is so clearly established by the decisions of this Court as now to be beyond any reasonable dispute.

In Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 70 S. Ct. 577, 94 L. ed. 795 (1950), a suit filed by a railroad involving conflicting job claims by existing employees and claims for back pay under existing agreements, the **jurisdictional** requirements of the act were thus applied (page 799 of 94 L. ed.):

> "The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail.
>
> "In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties."

and the specific holding of the Court based thereon was (p. 800 of 94 L. ed.):

> "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

Particularly apt to the circumstances disclosed in the record here is Order of Railway Conductors of America v. Southern Railway, 339 U. S. 255, 94 L. ed. 811, a suit

filed in the State Court by the Railroad in a dispute with some conductors over claimed job rights and back pay. This Court held that the South Carolina Court had no jurisdiction to interpret the terms of the bargaining agreement or to adjudicate the claims of the conductors against the railroad. Its holding and analysis was as follows (p. 814 of 94 L. ed.):

> "For reasons set out in the Slocum case, 339 U. S. 239, ante, 795, 70 S. Ct. 577, we hold that the South Carolina state court was without power to interpret the terms of this agreement and adjudicate the dispute. We discuss this case separately because it sharply points up the conflicts that could arise from state court intervention in railroad-union disputes. After the railroad had sued in the state court, the union filed a petition for hearing and award before the Adjustment Board. The state court nevertheless proceeded to adjudicate the dispute. Sustaining the state court's action would invite races of diligence whenever a carrier or union preferred one forum to the other. And if a carrier or a union could choose a court instead of the Board, the other party would be deprived of the privilege conferred by § 3, First (i) of the Railway Labor Act, 45 U. S. C. A., § 153, First (i), F. C. A., Title 45, § 153, First (i), which provides that after negotiations have failed 'either party' may refer the dispute to the appropriate division of the Adjustment Board.
>
> "The judgment of the South Carolina Supreme Court is reversed and the cause is remanded for proceedings not inconsistent with this opinion."

These firmly fixed principles and jurisdictional requirements of the federal law were expressly reaffirmed by this Court in Pennsylvania Railroad Company v. Day, 360 U. S. 548, 3 L. ed. 2d 1422 (1959). In that case this

Court held that a retired railroad employee could not bypass the Adjustment Board by bringing his suit in court since his claim was based on a collective bargaining agreement. The suit was returned to the District Court with instructions to dismiss for lack of jurisdiction the court saying in part (at page 1427 of 3 L. ed. 2d):

> "We can take judicial notice of the fact that provisions in railroad collective bargaining agreements are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application. Wholly apart from the adaptability of judges and juries to make such determinations, varying jury verdicts would imbed into such judgments varying constructions not subject to review to secure uniformity. Not only would this engender diversity of proceedings but diversity through judicial construction and through the construction of the Adjustment Board. Since nothing is a greater spur to conflicts and eventually conflicts resulting in strikes, than different pay for the same work or unfair differentials, not to respect the centralized determination of these questions through the Adjustment Board would hamper if not defeat the central purpose of the Railway Labor Act.
>
> "Our decision in Moore v. Illinois Cent. R. Co., 312 U. S. 630, 85 L. ed. 1089, 61 S. Ct. 754, does not stand in the way of this. The decision in that case has been given its proper, limited scope in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 90 L. Ed. 795, 70 S. Ct. 577. Moore carved out from the controlling doctrine of primary jurisdiction the unusual and special situation of wrongful discharge where the aggrieved employee had been expelled from the employment relationship.

* * * * * * *

> "Our consistent regard for the importance of having disputes between railroad employees and carriers settled by the Administrative Board which Congress established for that purpose requires respondent to resort to the NRAB for adjudication of his claim."

The claim and suit here pressed against the Petitioner by Respondent Milstead expressly seeks an order of the Court (a) interpreting and applying the provisions of the agreements in question so as to award Respondent Milstead a seniority standing ahead of the other four locomotive engineers whose standing Respondent contests, and (b) awarding Respondent damages for alleged breach of the agreement (R. 10, 46-47). Only one of those other engineers (C. C. Griggers) whose existing job rights and seniority Respondent Milstead contests, is a party to the proceedings in the State Courts below. The Courts below concededly have no jurisdiction of the other three (Daniel, Slaughter and Jackson). No decision or judgment which the Courts below could render can bind Daniel, Slaughter or Jackson. If Respondent Milstead could somehow obtain in the Courts below the relief he seeks against Petitioner, any judgment or orders so obtained could not bind Daniel, Slaughter or Jackson or any tribunal to which they would be calculated to resort to protect and establish their job rights and seniority which would have been so impinged. Thus, Petitioner (and to a possibly less extent, Respondent Milstead himself) would be caught up in the whipsaw of almost unending litigation in a variety of tribunals and likely with irreconcilable results. It is just such injustice and confusion which the Railway Labor Act was designed to forestall. In the wisdom and discretion of Congress all such controversies are channeled to the centralized determination by the National Railroad Adjustment Board, the only tribunal which, as here, has jurisdiction of all parties who can be involved in the dispute and which can resolve

and determine fully, finally and completely, the rights of all interested entities, including Petitioner, Respondent, the Brotherhoods and the four other individual employees, Griggers, Daniel, Slaughter and Jackson, whose job and seniority rights Respondent contests.

Even a District Court which has general receivership jurisdiction of all property and affairs of an interstate rail carrier does not have jurisdiction to determine an adversary dispute requiring interpretation of bargaining agreements, and such dispute must be referred to the Adjustment Board as required by the Railway Labor Act. Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. ed. 319.

The controversy here sought to be presented by the Respondent is not to be removed from the clear mandate of the Federal Act as applied in the foregoing opinions by the influence of any of the opinions of this Court dealing with controversies between employees and their own collective bargaining agent. Each of those decisions expressly distinguishes itself from the issues here involved. For instance, in Steele v. Louisville & Nashville R. Co., 323 U. S. 192, 89 L. ed. 173, 65 S. Ct. 226, the Court is careful to say (page 185 of 89 L. ed.):

> "There is no question here of who is entitled to represent the craft * * *. Nor are there differences as to the interpretation of the contract which by the act are committed to the jurisdiction of the Railroad Adjustment Board."

and in Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768, 72 S. Ct. 1022, 96 L. ed. 1283 (1952), the Court carefully expresses the subject matter and issues thus (page 1289 of 96 L. ed.):

> "The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdic-

tion to the Adjustment Board under our holding in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239; 94 L. ed. 795, 70 S. Ct. 577. This dispute involves the validity of the contract, not its meaning."

Also in Conley v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. ed. 2d 80, this Court was careful to point out that in that decision it was not sanctioning court action against carriers by employees involving disputes requiring interpretation of bargaining agreements, saying (pp. 83 and 84 of 2 L. ed. 2d):

"But See. 3 First (i) by its own terms applies only to disputes between an employee or a group of employees and a carrier or carriers: This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining."

Here the claim and controversy sought to be presented by the Respondent Milstead expressly relies upon the contracts in question; asks the Courts below to interpret and apply the agreements so as to accord him the more favorable relative seniority standing which he claims under them and also seeks recovery of damages against Petitioner as for alleged breach of the agreements. The character and subject matter of the controversy thus established cannot be changed by allegations that Respondent's own unions have discriminated against him and failed to represent him fairly in the bargaining process; nor by the bald unimplemented contention that Petitioner "conspired" in interpreting and applying the existing agreement so as to deny privileges which he claims.

Thus, the judgment and orders of the court below, followed by the immediate ex parte issuance of the temporary injunction by the lower nisi prius court (Appendix,

pp. 34 and 43) purporting to restrain Petitioner from further efforts to present the controversy to the National Railroad Adjustment Board, all in patent disregard of the requirements of the Federal Act, appear to evince a hostility and contempt for the provisions of the Federal Act, as applied under the decisions of this Court.

The need for review of the opinion and judgment below is urgent. It is urgent in the broad public interest to achieve uniform application of the provisions of the Federal statute. To Petitioner it is particularly urgent in order to prevent irreparable deprivation of its rights under the Federal Act.

The opinion and judgment below that the Courts of the State of Alabama have plenary jurisdiction to entertain and adjudicate the claim here made against Petitioner is final as respects review by this Court.

The concept of finality as a condition of review, applicable alike regarding review of orders of federal courts, 28 U. S. C. A., Sec. 1291, and to review of orders of state courts, 28 U. S. C. A., Sec. 1257 (3), is not so inelastic as to require self-defeating judicial application. Illustrative of this is this Court's analysis of the concept of finality in Swift & Co. v. Compania Colombiana, 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206, as follows (page 1210 of 94 L. Ed.):

> "I. There is a threshold question as to the jurisdiction of the court below to entertain the appeal. It is claimed that the order vacating the attachment was not a final order and therefore not reviewable.
>
> "We believe that the order comes squarely within the considerations of our recent decision in Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221. The litigation arising out of the claim of the libelants has not run its entire

> course, but the order now here, like that in the Cohen case, 'appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' 337 U. S. at 546. Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible. Cf. The Panaghia Kathariotisa (C. A. 3rd Pa.), 165 F. 2d 430. Under these circumstances the provision for appeals only from final decisions in 28 U. S. C. A., § 1291, F. C. A. title 28, § 1291 should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process."

It is obvious that the judgment of the Court below that the courts of the State of Alabama have plenary jurisdiction to entertain and adjudicate the claim here made against Petitioner, requiring construction and application of the terms of a collective bargaining agreement within the meaning of the Railway Labor Act, is as final as it ever will be for purposes of review. It is also abundantly clear that the judgment and opinion of the Court below, limited entirely to the question of jurisdiction, is "fairly severable from the context of a larger litigious process". Indeed, the record here demonstrates that unless the opinion below is now reviewed and resolution of the issues involved brought into harmony with the prevailing doctrine of the law, the litigious processes involving petitioner will become larger and larger and multiplied almost ad infinitum.

Most apt here also is the expression and application of the concept of finality by this Court in Cohen v. Beneficial

Industrial Loan Corporation, 337 U. S. 541, 93 L. ed. 1528, as to appealability of an order in a stockholder's derivative suit on whether a State statute requiring the plaintiff to give security for costs and attorneys fees applied, a question preliminary to litigation of the merits of the asserted claims. Holding the order regarding applicability of the security for costs statute to be reviewable within the proper application of the concept of finality, this Court said (p. 1536 of 93 L. ed.):

> "But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.
>
> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. Bank of Columbia v. Sweeny, 1 Pet. (U. S.) 567, 569, 7 L. ed. 265, 266; United States v. River Rouge Improv. Co., 269 U. S. 411, 414, 70 L. ed. 339, 343, 46 S. Ct. 144; Cobbledick v. United States, 309 U. S. 323, 328, 84 L. ed. 783, 786, 60 S. Ct. 540.
>
> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

Clearly, the jurisdictional question, the only question decided by the Court below, is separable from and wholly collateral to issues involved in the rights asserted in the action by Respondent. It is clear, too, that if the judgment stands and Petitioner is required to go through a trial on the merits of the claim and grievance presented in the State Courts, its right under the Railway Labor Act to have the controversy fully determined by the Adjustment Board will be irretrievably lost. It is respectfully submitted that the fundamental jurisdictional question involved is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated".

CONCLUSION.

Upon the considerations set forth, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

JOHN W. WELDON,

PEYTON D. BIBB,
1115 First National Building,
Birmingham, Alabama,
Attorneys for Petitioner,
Atlantic Coast Line Railroad
Company.

Certificate of Service.

I hereby certify that copies of this "Petition for Writ of Certiorari to the Supreme Court of Alabama", including attached Appendix, have been served upon Wm. M. Acker, Jr., Esq., attorney of record for Respondent E. H.

Milstead and upon E. T. Brown, Jr., Esq., attorney of record for the Grand International Brotherhood of Locomotive Engineers and C. C. Griggers, and also upon Erle Pettus, Jr., Esq., attorney of record for the Brotherhood of Locomotive Firemen and Enginemen, by depositing the same in a United States mail box, first class postage prepaid, and properly addressed to them at their respective post office street addresses in the City of Birmingham, Alabama.

This the 27th day of August, 1962.

Peyton D. Bibb, as Attorney for Petitioner, Atlantic Coast Line Railroad Company.

APPENDIX—DOCUMENT NO. 1.

(Filed May 10, 1962.)

The State of Alabama—Judicial Department.

The Supreme Court of Alabama,
October Term, 1961-62.

6 Div. 633.

E. H. Milstead

v.

Atlantic Coast Line Railroad Company et. al.

Appeal from Jefferson Circuit Court.

Simpson, Justice.

This appeal is pursuant to Title 7, § 819, Code 1940, from a judgment of the Circuit Court of Jefferson County overruling the appellant's demurrers to the pleas in abatement filed by appellees, which said ruling caused appellant to suffer a non-suit.

The original complaint sought a declaratory judgment and $20,000 damages for loss of wages alleged as the result of a collusive and discriminatory misconstruction and misapplication by appellees of certain memoranda which amended the collective bargaining agreement, the effect of which was to deny the appellant his correct seniority status as a locomotive engineer.

Appellant's original complaint named as defendants the Atlantic Coast Line Railroad Company, the Locomotive Firemen and Enginemen (Firemen), Grand International Brotherhood of Locomotive Engineers(Engineers), C. C. Griggers, W. W. Daniel, W. S. Slaughter and T. T. Jack-

son, Jr. The complaint made Daniel, Slaughter, Jackson and Griggers parties, not because of a charge of personal misconduct, but because they were carried on the seniority roster ahead of appellant. Because Daniel, Slaughter and Jackson resided in Georgia, appellant obtained service pursuant to Title 7, § 201, Code 1940. Others were personally served in Alabama. Defendants Firemen Jackson, Daniel and Slaughter filed motions to quash, and the court sustained motions of Jackson, Slaughter and Daniel. All defendants filed special pleas in abatement, designated A, B, C, D, E, F, G, H and I, to which appellant demurred separately and severally. All of the pleas in abatement, except plea I, relied upon the proposition that the National Railroad Adjustment Board was the only appropriate forum for hearing the controversy. Plea I sought to set up as matter in abatement the decree of the U. S. District Court of the Southern Division of the Northern District of Alabama remanding the cause to the Circuit Court for the Tenth Judicial Circuit of Alabama, after the defendants had removed it there. Appellant amended his complaint and defendants Atlantic Coast Line Railroad Company, Firemen, Engineers and Griggers reinterposed pleas in abatement B, D, F, H and I, striking pleas A, C, E and G. Demurrers were again filed by appellant. The court sustained appellant's demurrer to plea I, but overruled his demurrer to pleas in abatement B, D, F and H, in effect holding that the court had no jurisdiction over the subject matter because of the exclusive jurisdiction of the National Railroad Adjustment Board.

Appellant states that the pleas in abatement simply state legal conclusions based upon the fact that appellant is an employee of A. C. L. Railroad Company, that the only forum presently open to appellant for the adjudication of the alleged grievance is the National Railroad Adjustment Board.

It is conceded by appellant at the outset that **Davis v. Southern Railway Co.** (1951), 256 Ala. 202, 54 So. 2d 308, must be overruled if he is to prevail. The question presented in the **Davis** case is precisely the case we have before us here. The question there, as here, was whether or not appellant, who was presently an employee of the railroad, could maintain an action in the courts for damages for loss of seniority rights, involving the interpretation of a bargaining agreement, before he had exhausted his administrative remedies provided by the Railway Labor Act.

In view of the numerous decisions which have been rendered by the Supreme Court of the United States and various appellate courts of other jurisdictions since the **Davis** case, we believe it appropriate to look once again at this matter.

The pertinent provision is Title 45, § 153, U. S. C. A., which, in part, reads:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes **may** be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis ours.)

At the time we decided the **Davis** case, there were several decisions of the Supreme Court of the United States con-

struing this section. The leading case was **Moore v. Illinois Central R. Co.**, 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, decided in 1941. Next came **Slocum v. Delaware, L. & W. R. Co.**, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950), and **Order of Railway Conductors of America v. Southern Railway Co.**, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811 (1950). The **Moore** case was a suit by a discharged employee against the railroad. The contention was there made by the company that a discharged employee had failed to exhaust the administrative remedies provided by the Railway Labor Act. The court said, however:

> "But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. * * * It is to be noted that the section pointed; § 153 (i), as amended in 1934, provides no more than that disputes **'may** be referred . . . to the . . . Adjustment Board . . .' It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute **shall** be referred to the designated Adjustment Board by the parties, or by either party . . .' This difference in language, substituting 'may' for 'shall', was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose."

The Supreme Court of the United States seemed to have limited this language, however, in the **Slocum** case, supra. That case, as well as **Order of Railway Conductors of America v. Southern Railway Co.**, supra, involved disputes between the railroad and the union. In that situation, the court said in **Slocum**:

> "Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board

to hold hearings, make findings, and enter awards in all disputes between carriers and their employees 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . .' * * *

"The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.' * * * This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements. * * * Carriers are therefore required to negotiate with the bargaining representatives of the employees. * * *

"This type of grievance [i. e., one between carrier and union] has long been considered a potent cause of friction leading to strikes. It was to prevent such friction that the 1926 Act provided for creation of various Adjustment Boards by voluntary agreements between carriers and workers. * * * But this voluntary machinery proved unsatisfactory and in 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a national Adjustment Board * * *"

The Court then went on to hold that the court below (the State Court of New York) should have refused to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents. It distinguished the **Moore** case, saying:

"Our holding here is not inconsistent with our holding in Moore v. Illinois Central R. Co., 312 U. S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead, he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an em-

ployee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. * * *"

but, the Court said:

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

However, the Court noted:

"We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in Steele v. Louisville & N. R. Co., 323 U. S. 192." (Footnote 7.)

It was in this climate that we were called upon to decide the **Davis** case. At that time it appeared that the **Slocum** case, supra, was controlling. We relied upon it in holding that an employee (one still in the employ of the carrier) must exhaust his administrative remedies as provided in the Railway Labor Act. It is possible that in so holding we overlooked the significance of the **Steele** case. The cases which have followed **Steele** would seem to so indicate. That case was decided in 1944 and involved a suit by a Negro employee against both the railroad and the union. There (in **Steele**) protests and appeals of petitioner addressed to the carrier and the union to secure relief and redress were ignored. He alleged that the Brotherhood was the exclusive bargaining agent and in that capacity it was under an obligation and duty to represent the Negro fireman impartially and in good faith, but instead it had been hostile and disloyal to Negro firemen, "has deliberately discriminated against them, and has sought to deprive them of their seniority rights and to drive them out of employment in their craft". The bill asked, inter alia, for a declaratory judgment as to their

rights and for damages against the Brotherhood for its wrongful conduct. This Court (Alabama Supreme Court) had held, on the merits, that the complaint stated no cause of action in that it was believed that the Brotherhood was empowered by the Act to enter into the agreement and by virtue of the statute that the Brotherhood had power to create by agreement with the railroad seniority rights of the petitioner and to destroy them. In reversing, the Supreme Court of the United States said:

> "Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among the members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. * * *
>
> "So long as a labor union assumes to act as statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining * * * to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."

The Court then went on to point out that the Act

> * * * **makes no reference to disputes between employees and their representative.** Even though the dispute between the railroad and petitioner were [sic] to be heard by the Adjustment Board, that Board

> could not give the entire relief here sought. The Adjustment Board has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. 'The only way that an individual may prevail is by taking his case to the union and causing the union to carry it to the Board.'" (Emphasis added.)

The petitioner was held to have a remedy in Court. To like effect was **Tunstall v. Brotherhood of Locomotive Firemen and Enginemen**, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187, likewise involving a Negro employee suing the union.

We were of the opinion in 1951 when the **Davis** case was decided that the Supreme Court of the United States had limited this line of cases to those involving racial discrimination. However, later developments indicate that other types of discrimination may be the key which opens the judicial door. **Mount v. Grand International Brotherhood of Locomotive Engineers**, 226 F. 2d 604 (Sixth Circuit), cert. den. 350 U. S. 967, 76 S. Ct. 436, 100 L. Ed. 839, was decided in 1955 by the Sixth Circuit. Appellee there contended that the **Steele** and **Tunstall** cases involved racial discrimination only and therefore were not controlling. The Circuit Court of Appeals answered:

> "We are of the opinion that the cases are not so limited. It is true that the particular discrimination involved in those cases was based upon race, but the rulings are based upon the broad principle that the Railway Labor Act prohibits 'hostile discrimination' between members of the craft, irrespective of whether it is based on race or some other ground unrelated to race. * * * 'Hostile discrimination' is not limited to discrimination on account of race."—Citing in support the **Steele** case, supra, and **Howard** case, infra.

This reasoning following the dissenting opinion in **Brotherhood of Railroad Trainmen v. Howard**, 343 U. S. 768, 72 S. Ct. 1002, 96 L. Ed. 1283, where it was stated in this racial discrimination case:

> "It would have been the same if the Brotherhood had discriminated against him on some other ground, unrelated to race. It was the Brotherhood's duty 'to act on behalf of all employees which, by virtue of the statute, it undertakes to represent.'"

In 1957, the Supreme Court of the United States again had before it a case involving Negro workmen in **Conley v. Gibson**, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. There the petitioners sought declaratory judgment, injunctive relief and damages. The respondents again contended that the N. R. A. B. had exclusive jurisdiction. The Court again emphatically stated:

> "We hold that it was error for the courts below to dismiss the complaint for lack of jurisdiction. They took the position that § 3 First (i) of the Railway Labor Act conferred exclusive jurisdiction on the Adjustment Board because the case, in their view, involved interpretation and application of the collective bargaining agreement. But § 3 First (i) by its own terms applies only to **'disputes between an employee or group of employees and a carrier or carriers'**. This case involves no dispute between employee and employer, but to the contrary is a suit **by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining.** The Adjustment Board has no power under § 3 First (i) or any other provision of the Act to protect them from such discrimination." (Emphasis added.)

The Court then pointed out that "for this reason the decision in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239,

is not applicable here. The courts below also relied on Hayes v. Union Pacific Ry. Co., 184 F. 2d 337, cert. den., 340 U. S. 942, but for the reasons set forth in the text **we believe that case was decided incorrectly.**" (Footnote 4.) It should be noted that we also relied on the Hayes case for our holding in **Davis.**

Following this line of cases the Supreme Court of Texas held in 1958, in **Choate v. Grand International Brotherhood of Locomotive Engineers**, 314 S. W. 2d 795, 798, that state courts had jurisdiction of a suit for determination of the validity of the union's application of a working agreement. This again was a suit by present employees against their bargaining representative, who contended that the subject matter lay within the exclusive jurisdiction of the N. R. A. B. The Court said:

> "It will be noted that the Act refers only to 'disputes between an employee or group of employees and a carrier or carriers'. Controversies between railroad employees and their union are thus not included in the jurisdiction granted thereby. * * * It is equally well settled, however, that both the state and federal courts may entertain a suit by railroad employees against their bargaining representative for a breach of the latter's statutory duty to represent all members of the craft fairly, impartially, in good faith and without hostile discrimination."

The Court said there was no basis for the distinction argued by respondents to the effect that the **Steele, Tunstall, Howard**, and **Conley** cases, supra, applied only to racial discrimination cases, saying "no basis for that distinction can be found in the opinions of the Supreme Court of the United States."

Also in 1958, the Federal District Court for the 2nd District of New York, decided **Charles v. Brotherhood of**

Railroad Trainmen, 167 F. Supp. 635. Again, the defendants sought to dismiss on the ground that the court lacked jurisdiction over the subject matter, and contended that **Conley**, **Howard**, and **Steele** involved only racial discrimination. The Court said:

> "It is true that in each of these cases the invidious discrimination which the Supreme Court held violative of the provisions of the Railway Labor Act was directed against a class of employees because of their race. However, the language of the opinions does not in any way lead to the conclusion that only racial discrimination can be invidious. Indeed, discrimination, wholly apart from race, has been held to give rise to a federal cause of action."—(Citing the **Mount** and **Choate** cases, supra.)

As late as 1961, the Fourth Circuit had occasion to consider the question in **Hosteller v. Brotherhood of Railroad Trainmen**, 287 F. 2d 457. It said:

> "It is well established that, under both the Railway Labor Act and the National Labor Relations Act, 29 U. S. C. A., § 151 et seq., a bargaining agent must fairly and without discrimination represent all employees in the bargaining unit, and that employees discriminatorily treated have recourse to the federal courts."—(Citing **Steele v. L. & N. Ry. Co.**, supra; **Tunstall v. Brotherhood, etc.**, supra.)

The Court then held that the acts complained of failed "to constitute arbitrary discrimination forbidden by law."

On the basis of the developments indicated by all of the foregoing cases, decided since the **Davis** case, we can but conclude that the Railway Labor Act was not intended to confer exclusive jurisdiction on the National Railroad Adjustment Board of cases involving disputes between employees and their bargaining representatives. This conclusion is strengthened in cases like the one before us,

where discrimination is alleged, and where in certain circumstances the aggrieved employee might not receive any consideration by the Board.

We do not believe that the Supreme Court of the United States intended to open the doors to Negro employees who allege discrimination on account of race, and lock them to white or other employees who allege discrimination of other kinds.

We realize ours is, in the first instance, a divination contest to say in advance what the Federal Supreme Court will say later, but we are forced to conclude that our holding in the **Davis** case was incorrect and that the case at bar must be reversed. In so holding we, of course, express no opinion as to the merits of the same, but merely hold that it was error to overrule appellant's demurrers to the several pleas in abatement filed by appellees.

Reversed and Remanded.

All the Justices concur except Stakely, J., not sitting.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

6th Div., No. 633,
E. H. Milstead, Appellant

vs.

Atlantic Coast Line Railroad Company, a Corporation et al., Appellee.

From Jefferson Circuit Court.

The State of Alabama,
City and County of Montgomery.

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, num-

bered from one to eighteen inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this May 10, 1962.

J. Render Thomas,
Clerk of the Supreme Court of Alabama

APPENDIX—DOCUMENT NO. 2.

The Supreme Court of Alabama—
Thursday, May 10, 1962.

The Court met pursuant to adjournment.

Present: All the Justices.

6th Div. 633.

E. H. Milstead

vs.

Atlantic Coast Line Railroad Company, a Corporation, et al.

} Jefferson Circuit Court.

Come the parties by attorneys and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error.

It Is Therefore Considered, Ordered and Adjudged that the judgment of the Circuit Court be and the same is hereby reversed and annulled and the cause remanded to said Court for further proceedings therein.

It Is Further Considered, Ordered and Adjudged that the appellees, The Atlantic Coast Line Railroad Company et al., pay the costs accruing on said appeal in this Court and in the Court below, for which costs let execution issue.

APPENDIX—DOCUMENT NO. 3.

The Supreme Court of Alabama,—
Thursday, June 28, 1962.

The Court met pursuant to adjournment.

Present: All the Justices.

6th Div. 633.

E. H. Milstead

vs.

Atlantic Coast Line Railroad Company, a Corporation, et al.

} Jefferson Circuit Court.

It Is Hereby Ordered that the applications for rehearing filed in the above cause on May 24, 1962, and May 25, 1962, be and the same are hereby overruled.

APPENDIX—DOCUMENT NO. 4.

(July 30, 1962.)

The State of Alabama—Judicial Department.

Supreme Court of Alabama,
Special Term, 1962.

6th Div. 633.

E. H. Milstead

vs.

Atlantic Coast Line Railroad Company, a Corp., et al.

Jefferson Circuit Court.

The Appellees in the above-styled cause having filed in this Court a motion to stay the execution and enforcement of the judgment entered in this cause pending application for review by the United States Supreme Court and pending decision by the National Railroad Adjustment Board and the same being submitted on briefs and duly examined and understood by the Court.

It Is Considered, Ordered and Adjudged that the said motion for a stay be and the same is hereby denied.

E. H. Milstead, Appellant in the above-styled cause, having filed in this Court an original petition for an injunction against the Appellee, Atlantic Coast Line Railroad Company, prohibiting it from proceeding before the National Railroad Adjustment Board to have the matter in dispute in this cause decided by said board and praying further that the said Appellee, Atlantic Coast Line Railroad Company, be required to dismiss and withdraw the proceedings filed with the National Railroad Adjustment Board, and said petition being submitted on briefs and duly examined and understood by the Court.

It Is Considered, Ordered and Adjudged that appellant's petition for an injunction be and the same is hereby denied.

I, J. Render Thomas, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 30 day of July, 1962.

J. Render Thomas,
Clerk, Supreme Court of Alabama.

APPENDIX—DOCUMENT NO. 5.

Summons Resident.

The State of Alabama,
Jefferson County:

Circuit Court, Tenth Judicial Circuit of Alabama.

Equity Division.

No. 127-574.

To Any Sheriff of the State of Alabama—Greetings:

You are commanded to summon Atlantic Coast Line Railroad Company, a corporation, to appear and plead, answer or demur within thirty days from the service hereof, to the Bill of Complaint, filed in the Circuit Court, Tenth Judicial Circuit of Alabama Equity Division) at Birmingham, Alabama, by E. H. Milstead against Atlantic Coast Line Railroad Company.

Herein fail not and make due return of this writ as the law directs.

Witness my hand this the 7 day of August, 1962.

H. H. Boyd,
Register.

Executed by handing the within named respondent... a copy of the within writ, together with a copy of the Bill of Complaint and Fiat in this Cause on the ..... day of ....., 19....

.....
Sheriff,

By .....
D. S.

Sheriff claims ..... miles.

In the Circuit Court for the Tenth Judicial Circuit of Alabama.

E. H. Milstead,
Complainant,
v.
Atlantic Coast Line Railroad Company, a Corporation,
Respondent.

In Equity.
No. 127-574.

Bill of Complaint.

Comes now E. H. Milstead, complainant in the above-styled cause, and respectfully shows unto the Honorable Court as follows, viz.:

1. Complainant is over the age of twenty-one years and is a resident of Jefferson County, Alabama, his residence address being 1444 Eighteenth Street, S. W., Birmingham, Alabama. Respondent, Atlantic Coast Line Railroad Company, is a corporation incorporated under the laws of the State of Virginia. It does business in the State of Alabama and in Jefferson County, Alabama, and has a place of business located at 16 North Eleventh Street, Birmingham, Alabama, and is amenable to service at said address.

2. Complainant filed his complaint-at-law against respondent and others in the Circuit Court for the Tenth Judicial Circuit of Alabama (Civil Division) on, to-wit, March 18, 1960, being Cause No. 48972-X. A copy of complainant's said complaint-at-law and subsequent amendment are attached hereto as Exhibits A and B and are incorporated herein as if set forth in full.

3. The substance of complainant's said complaint-at-law is his averment that through the concert of certain of the defendants therein the pertinent provisions of the collective bargaining agreement were misapplied so as to place complainant, a locomotive engineer for respondent, on the

seniority roster in an incorrect position, to his past and present damage. Defendants in said Cause No. 48972-X filed pleas-in-abatement designed to test the jurisdiction of the Circuit Court and averring that the National Railroad Adjustment Board had exclusive jurisdiction over the subject matter of the controversy. Honorable Whit Windham, Circuit Judge, overruled complainant's (plaintiff's) demurrers to these pleas-in-abatement causing a voluntary nonsuit, and complainant (plaintiff) appealed to the Supreme Court of Alabama in order to determine the said question of jurisdiction.

4. On, to-wit, May 10, 1962, the Supreme Court of Alabama decided the case of E. H. Milstead v. Atlantic Coast Line Railroad Company et al., Sixth Division, No. 636, and wrote an opinion that the Circuit Court for the Tenth Judicial Circuit of Alabama did have jurisdiction over the subject matter presented by complainant (plaintiff) in his case No. 48972-X, and authorizing complainant (plaintiff) to proceed in the said Circuit Court.

5. Article No. 30 of the collective bargaining agreement binding on complainant and respondent provides that a dispute will be barred unless presented to a tribunal having jurisdiction within six months of the decision of the highest officer of the Company, the said decision of the highest officer having been made on, to-wit, October 17, 1959.

6. On, to-wit, July 23, 1962, respondent purported to make an ex parte submission to the National Railroad Adjustment Board of the identical questions regarding the proper interpretation and application of the pertinent provisions of the collective bargaining agreement as previously presented to the Circuit Court for the Tenth Judicial Circuit of Alabama in the abovesaid Cause No. 48972-X there now pending. A copy of the said purported ex parte submission is attached hereto as Exhibit C and incorporated herein by reference as if set forth in full.

7. Respondent, in filing said ex parte submission with the National Railroad Adjustment Board more than six months after the controversy had matured, is attempting to avoid the mandate of the Supreme Court of Alabama and to circumvent and preempt the clear jurisdiction of the Circuit Court for the Tenth Judicial Circuit of Alabama (Civil Division) already judicially determined to exist.

Wherefore, Premises Considered, Complainant prays that the Court will take jurisdiction of this cause and by proper process to the Atlantic Coast Line Railroad Company, a corporation, make it a party and require that it plead, answer, or demur within the time prescribed by law or to suffer a decree pro confesso to be entered against it; and complainant further prays that the Court will, upon consideration of this complaint, immediately issue a temporary injunction or restraining order enjoining and restraining respondent from proceeding in any way with its purported cause before the National Railroad Adjustment Board and, after final hearing that the Court will issue a permanent and mandatory injunction requiring respondent to withdraw and to dismiss its purported ex parte submission before the National Railroad Adjustment Board. Complainant prays for such other or further or alternative relief as shall be meet and proper in the premises.

Smyer, White, Reid & Acker,
By William M. Acker, Jr.,
Solicitors for Complainant.

Verification.

State of Alabama,
Jefferson County.

Personally appeared before the undersigned authority in and for Jefferson County, State of Alabama, E. H. Mil-

stead, complainant, and being duly sworn according to law, deposes and says that the matters and things alleged in the foregoing petition are true and correct.

E. H. Milstead.
E. H. Milstead.

Sworn to and subscribed before me on this .... day of ....., 1962.

....,
Notary Public.

Fiat Ordering Issuance of Temporary Injunction or Restraining Order.

This cause being submitted to the Court upon application of the complainant for a temporary writ of injunction or restraining order as prayed for in the original bill herein, and upon consideration thereof, the Court being of the opinion that the same should be granted;

It Is, Therefore, Ordered, Adjudged and Decreed By the Court that upon complainant entering into a good and sufficient bond, conditioned as provided by law, in the sum of $500.00 same to be approved by the Register of this Court, that the Register issue a temporary writ of injunction as prayed for in the original bill in this cause.

Done and Ordered This the 6th day of August, 1962.

W. A. Jenkins, Jr.,
Circuit Judge, In Equity Sitting.

Note: The exhibits referred to in the foregoing "Bill of Complaint" in Equity appear in the Record as certified by the Clerk of the Supreme Court of Alabama as follows: Exhibits "A" and "B"—Appear of Record at pages 2 and 46, respectively; Exhibit "C"—Appears of Record at page 76. Accordingly such exhibits are not here again reproduced.

APPENDIX—DOCUMENT NO. 6.

Writ of Injunction

The State of Alabama,
Jefferson County.

Circuit Court, Tenth Judicial Circuit of Alabama,
Equity Division.

To any Sheriff of the State of Alabama—Greetings:

We Command You, that without delay you execute this Writ, and make due return how you have executed the same; according to law.

G. H. Boyd,
Register.

To Atlantic Coast Line Railroad Company, a corporation.

Whereas, E. H. Milstead has on August 1, 1962 filed his Bill of Complaint in this said Circuit Court against Atlantic Coast Line Railroad Company and praying among other things that a temporary injunction or restraining order be issued enjoining and restraining respondent from proceeding in any way with its purported cause before the National Railroad Adjustment Board.

And Whereas, on said Bill being exhibited to the Hon. W. A. Jenkins, Jr., one of the Judges of the Circuit Court, Tenth Judicial Circuit of Alabama, on the 6th day of August 1962 he did order, that upon Complainant's entering into bond with sureties in the sum of Five Hundred Dollars, and approved by the Register of this Court, payable and conditioned according to law, a Writ of Injunction issue out of this Court, according to the prayer of said bill:

And Whereas, Bond has been given as required by said Order,

These, Therefore, are to Command and Strictly Enjoin you, Atlantic Coast Line Railroad Company, a corporation, your officers, servants, or employees from proceeding in any way with your purported cause before the National Railroad Adjustment Board, until further orders from this Court; and this you will in no wise omit under penalty, etc.

Witness, ...
Register, Circuit Court, Tenth Judicial Circuit of Alabama, this 7th day of August 1962.

G. H. Boyd,
Register.

Issued this 7th day of August, 1962.

APPENDIX—DOCUMENT NO. 7.

In the
Circuit Court of Jefferson County, Alabama.

Aug. 3, 1962.

E. H. Milstead, Plaintiff,

vs.

Atlantic Coast Line R. R. Co., a Corp., et al., Defendants.

Case No. 48,972-X.

Notice of Special Setting.

You are hereby notified that the above case, which was unreached on the last setting, has been specifically set on Monday, Sept. 17, 1962, before Judge Windham.

This case will not appear on the printed docket for that date. This is the only notice that you will receive. If you desire witnesses for this setting please file order at once.

Yours very truly,

Julian Swift,
Julian Swift,
Clerk.

By E. P.

Notices mailed to:

Smyer, White, Reid & Acker,
Room 606-620, Title Guarantee Bldg.,

Graham, Bibb, Wingo & Foster,
1st National Bldg.,

Cabaniss & Johnson,
9th Floor, 1st National Bldg.,

Rives, Peterson, Pettus & Conway,
10th Floor, Massey Bldg.,
Birmingham, Ala.

Office-Supreme Court, U.S.
FILED
AUG 28 1962
JOHN F. DAVIS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 382

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AND C. C. GRIGGERS,
Petitioners,

vs.

E. H. MILSTEAD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

HAROLD C. HEISS,
RUSSELL B. DAY,
ERLE PETTUS, JR.,
LUCIEN D. GARDNER, JR.,
DRAYTON T. SCOTT,
HAROLD N. McLAUGHLIN,
[redacted]
Counsel for Petitioners.

Of Counsel:

HEISS, DAY & BENNETT,
622 Keith Building,
Cleveland 15, Ohio,

RIVES, PETERSON, PETTUS & CONWAY,
1007 Massey Building,
Birmingham 3, Alabama,

CABANISS & JOHNSTON,
902 First National Building,
Birmingham 3, Alabama,

MARSHMAN, HORNBECK, HOLLINGTON, STEADMAN AND McLAUGHLIN,
Union Commerce Building,
Cleveland 14, Ohio.

INDEX

Petition for Writ of Certiorari to the Supreme Court of Alabama	1
The Opinion Below	2
Jurisdiction	2
The Questions Presented	2
The Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ	4
Argument	4
Conclusion	5
Certificate of Service	6

Appendix—

Opinion of the Supreme Court of Alabama	A1

STATUTE CITED

Railway Labor Act. 45 U.S.C.A. Section 151 et seq.—	
Section 153 (i)	3
Section 151(a) (4) and (5)	3-4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. .....

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AND C. C. GRIGGERS,
Petitioners,

vs.

E. H. MILSTEAD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, Grand International Brotherhood of Locomotive Engineers, an unincorporated association, and C. C. Griggers, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama entered on May 10, 1962, reversing the judgment of the Circuit Court of Jefferson County, Alabama, and the order of the Supreme Court of Alabama denying rehearing entered on June 28, 1962.

THE OPINION BELOW.

The opinion of the Supreme Court of Alabama in question, issued May 10, 1962, is reported at 142 So.2d 705, Ala. . Full, true and correct copy of such opinion is appended hereto (App. p. A1).

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Section 1257(3), to review the judgment in question of the Alabama Supreme Court, since rights are claimed by Petitioners under a statute of the United States. Application for rehearing in the Supreme Court of Alabama (R. 67) was overruled June 28, 1962 (R. 69)[1]. Petitioner's "Motion for Stay Pending Application for Review, etc." (R. 73) was denied by order of the Supreme Court of Alabama on July 30, 1962 (R. 77).

THE QUESTIONS PRESENTED.

The questions presented are: (a) Whether a State Court has jurisdiction to hear and determine suits by a railroad employee seeking to declare and fix rights to more favorable seniority standing which requires the interpretation and application of existing collective bargaining agreements relative to rates of pay, rules and working conditions governing the employee's status as a railroad employee, and (b) Is the action of the Supreme Court of Alabama in holding that Alabama Courts have jurisdiction to hear and determine such employee suits hostile to and

---

1. References are to pagination of the record as certified by the Clerk of the Supreme Court of Alabama.

in violation of the Federal Statutes as interpreted under the decisions of this Court?

The holding of the Alabama Supreme Court that the Alabama Courts have jurisdiction of such suits is epitomized in the syllabus to its opinion as reported (Pages 705-706 of 142 So.2d) as follows:

> "Dispute arising out of locomotive engineer's assertion that railroads and unions had misconstrued collective bargaining agreement so as to deprive him of his correct seniority status was not within exclusive jurisdiction of National Railroad Adjustment Board and locomotive engineer could maintain instant action." [Action for damages and declaratory construction of agreement.]

THE STATUTE INVOLVED.

The statute involved is the Railway Labor Act, 45 U.S.C.A., Section 151 *et seq.*, and here, more particularly, 45 U.S.C.A., Section 153 (i), which provides as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of approval of this Act shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

And also the provisions of 45 U.S.C.A., Section 151(a) (4) and (5), as follows:

"151(a) GENERAL PURPOSES. The purposes of the Act are: * * * (4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rate of pay, rules or working conditions."

STATEMENT OF THE CASE.

Petitioners hereby adopt by reference the statement of the case as contained in the petition for Writ of Certiorari to the Supreme Court of Alabama filed by Atlantic Coast Line Railroad Company, Petitioner, versus E. H. Milstead, Respondent, in this Court.

REASONS FOR GRANTING THE WRIT.

Petitioners hereby adopt by reference the reasons for granting the writ as contained in the petition for Writ of Certiorari to the Supreme Court of Alabama filed by Atlantic Coast Line Railroad Company, Petitioner, versus E. H. Milstead, Respondent, in this Court.

ARGUMENT.

Petitioners hereby adopt by reference the argument as contained in the petition for Writ of Certiorari to the Supreme Court of Alabama filed by Atlantic Coast Line Railroad Company, Petitioner, versus E. H. Milstead, Respondent, in this Court.

CONCLUSION.

Upon the considerations set forth, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD C. HEISS,

RUSSELL B. DAY,

ERLE PETTUS, JR.,

LUCIEN D. GARDNER, JR.,

DRAYTON T. SCOTT,

HAROLD N. McLAUGHLIN,

[redacted],

Counsel for Petitioners.

CERTIFICATE OF SERVICE.

The undersigned, Erle Pettus, Jr., of counsel for Brotherhood of Locomotive Firemen and Enginemen, hereby certifies that a copy of the above and foregoing petition for certiorari was served by mailing a copy thereof by United States Mail, postage prepaid and duly addressed, to William M. Acker, Jr., Esq., 618 Title Building, Birmingham 3, Alabama, Counsel for Respondent, E. H. Milstead, this ..... day of August, 1962.

.....

ERLE PETTUS, JR.

APPENDIX

THE STATE OF ALABAMA . . . . . JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1961-62

6 Div. 633

E. H. Milstead

v.

Atlantic Coast Line Railroad Company, et al.

Appeal from Jefferson Circuit Court

SIMPSON, JUSTICE.

This appeal is pursuant to Title 7, §819, Code 1940, from a judgment of the Circuit Court of Jefferson County overruling the appellant's demurrers to the pleas in abatement filed by appellees, which said ruling caused appellant to suffer a non-suit.

The original complaint sought a declaratory judgment and $20,000 damages for loss of wages alleged as the result of a collusive and discriminatory misconstruction and misapplication by appellees of certain memoranda which amended the collective bargaining agreement, the effect of which was to deny the appellant his correct seniority status as a locomotive engineer.

Appellant's original complaint named as defendants the Atlantic Coast Line Railroad Company, the Locomotive Firemen and Enginemen (Firemen), Grand International

Brotherhood of Locomotive Engineers (Engineers), C. C. Griggers, W. W. Daniel, W. S. Slaughter, and T. T. Jackson, Jr. The complaint made Daniel, Slaughter, Jackson, and Griggers parties not because of a charge of personal misconduct, but because they were carried on the seniority roster ahead of appellant. Because Daniel, Slaughter, and Jackson resided in Georgia, appellant obtained service pursuant to Title 7, § 201, Code 1940. Others were personally served in Alabama. Defendants Firemen Jackson, Daniel and Slaughter filed motions to quash, and the court sustained motions of Jackson, Slaughter and Daniel. All defendants filed special pleas in abatement, designated A, B, C, D, E, F, G, H, and I to which appellant demurred separately and severally. All of the pleas in abatement except plea I, relied upon the proposition that the National Railroad Adjustment Board was the only appropriate forum for hearing the controversy. Plea I sought to set up as matter in abatement, the decree of the U.S. District Court of the Southern Division of the Northern District of Alabama remanding the cause to the Circuit Court for the Tenth Judicial Circuit of Alabama, after the defendants had removed it there. Appellant amended his complaint and defendants Atlantic Coast Line Railroad Company, Firemen, Engineers, and Griggers reinterposed pleas in abatement B, D, F, H, and I, striking pleas A, C, E and G. Demurrers were again filed by appellant. The court sustained appellant's demurrer to plea I but overruled his demurrer to pleas in abatement B, D, F, and H, in effect holding that the court had no jurisdiction over the subject matter because of the exclusive jurisdiction of the National Railroad Adjustment Board.

Appellant states that the pleas in abatement simply state legal conclusions based upon the fact that appellant is an employee of A. C. L. Railroad Company, that the only

forum presently open to appellant for the adjudication of the alleged grievance is the National Railroad Adjustment Board.

It is conceded by appellant at the outset that *Davis* v. *Southern Railway Co.*, (1951), 256 Ala. 202, 54 So.2d 308, must be overruled if he is to prevail. The question presented in the *Davis* case is precisely the case we have before us here. The question there, as here, was whether or not appellant, who was presently an employee of the railroad, could maintain an action in the courts for damages for loss of seniority rights, *involving the interpretation of a bargaining agreement*, before he had exhausted his administrative remedies provided by the Railway Labor Act.

In view of the numerous decisions which have been rendered by the Supreme Court of the United States and various appellate courts of other jurisdictions since the *Davis* case, we believe it appropriate to look once again at this matter.

The pertinent provision is Title 45, § 153, U.S.C.A., which, in part, reads:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis ours.)

At the time we decided the *Davis* case, there were several decisions of the Supreme Court of the United States construing this section. The leading case was *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, decided in 1941. Next came *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950), and *Order of Railway Conductors of America* v. *Southern Railway Co.*, 339 U.S. 255, 70 S. Ct. 585, 94 L. Ed. 811 (1950). The *Moore* case was a suit by a discharged employee against the railroad. The contention was there made by the company that a *discharged* employee had failed to exhaust the administrative remedies provided by the Railway Labor Act. The court said, however:

> "But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. * * * It is to be noted that the section pointed § 153 (i), as amended in 1934, provides no more than that disputes '*may* be referred . . . to the . . . Adjustment Board . . .' It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute *shall* be referred to the designated Adjustment Board by the parties, or by either party . . .'. This difference in language, substituting 'may' for 'shall', was not, we think an indication of a change in policy, but was instead a clarification of the law's original purpose."

The Supreme Court of the United States seemed to have limited this language, however, in the *Slocum* case, *supra*. That case, as well as *Order of Railway Conductors of America* v. *Southern Railway Co.*, *supra*, involved disputes between the railroad and the union. In that situation, the court said in *Slocum*:

"Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board to hold hearings, make findings, and enter awards in all disputes between carriers and their employees 'growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . .' * * *

"The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.' * * * This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements. * * * Carriers are therefore required to negotiate with the bargaining representatives of the employees. * * *

"This type of grievance [i. e. one between carrier and union] has long been considered a potent cause of friction leading to strikes. It was to prevent such friction that the 1926 Act provided for creation of various Adjustment Boards by voluntary agreements between carriers and workers.

* * * But this voluntary machinery proved unsatisfactory and in 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a national Adjustment Board * * *."

The Court then went on to hold that the court below (the State Court of New York) should have refused to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents. It distinguished the *Moore* case, saying:

"Our holding here is not inconsistent with our holding in Moore v. Illinois Central R. Co., 312 U.S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead, he chose to accept the railroad's action in dis-

> charging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases: * * *"

but, the Court said:

> "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

However, the Court noted:

> "We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in Steele v. Louisville & N. R. Co., 323 U.S. 192." (Footnote 7.)

It was in this climate that we were called upon to decide the *Davis* case. At that time it appeared that the *Slocum* case, *supra*, was controlling. We relied upon it in holding that an employee (one still in the employ of the carrier) must exhaust his administrative remedies as provided in the Railway Labor Act. It is possible that in so holding we overlooked the significance of the *Steele* case. The cases which have followed *Steele* would seem to so indicate. That case was decided in 1944 and involved a suit by a Negro employee against both the railroad and the union. There (in *Steele*) protests and appeals of petitioner addressed to the carrier and the union to secure relief and redress were ignored. He alleged that the Brotherhood was the exclusive bargaining agent and in that capacity it was under an obligation and duty to represent the Negro fireman impartially and in good faith, but instead it had been hostile and disloyal to Negro firemen, "has deliberately discriminated against them, and has sought to deprive them of their seniority rights and to drive them out of employment in their craft". The bill asked, *inter alia*, for

a declaratory judgment as to their rights and for damages against the Brotherhood for its wrongful conduct. This Court (Alabama Supreme Court) had held, on the merits, that the complaint stated no cause of action in that it was believed that the Brotherhood was empowered by the Act to enter into the agreement and by virtue of the statute that the Brotherhood had power to create by agreement with the railroad seniority rights of the petitioner and to destroy them. In reversing, the Supreme Court of the United States said:

> "Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among the members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. * * *
>
> "So long as a labor union assumes to act as statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining * * * to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."

The Court then went on to point out that the Act

> "* * *. *makes no reference to disputes between employees and their representative.* Even though the dispute between the railroad and petitioner were [sic] to be heard by the Adjustment Board, that Board could

> not give the entire relief here sought. The Adjustment Board has consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization. 'The only way that an individual may prevail is by taking his case to the union and causing the union to carry it to the Board.'" (Emphasis added.)

The petitioner was held to have a remedy in Court. To like effect was *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187, likewise involving a Negro employee suing the union.

We were of the opinion in 1951 when the *Davis* case was decided that the Supreme Court of the United States had limited this line of cases to those involving racial discrimination. However, later developments indicate that other types of discrimination may be the key which opens the judicial door.—*Mount* v. *Grand International Brotherhood of Locomotive Engineers*, 226 F.2d 604 (Sixth Circuit), cert. den. 350 U.S. 967, 76 S. Ct. 436, 100 L. Ed. 839, was decided in 1955 by the Sixth Circuit. Appellee there contended that the *Steele* and *Tunstall* cases involved racial discrimination only and therefore were not controlling. The Circuit Court of Appeals answered:

> "We are of the opinion that the cases are not so limited. It is true that the particular discrimination involved in those cases was based upon race, but the rulings are based upon the broad principle that the Railway Labor Act prohibits 'hostile discrimination' between members of the craft, irrespective of whether it is based on race or some other ground unrelated to race. * * * 'Hostile discrimination' is not limited to discrimination on account of race."—Citing in support the *Steele* case, supra, and *Howard* case, infra.

This reasoning following the dissenting opinion in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S.

768; 72 S. Ct. 1002, 96 L. Ed. 1383, where it was stated in this racial discrimination case:

> "It would have been the same if the Brotherhood had discriminated against him on some other ground, unrelated to race. It was the Brotherhood's duty 'to act on behalf of all employees which, by virtue of the statute, it undertakes to represent'."

In 1957, the Supreme Court of the United States again had before it a case involving Negro workmen in *Conley* v. *Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. There the petitioners sought declaratory judgment, injunctive relief and damages. The respondents again contended that the N. R. A. B. had exclusive jurisdiction. The Court again emphatically stated:

> "We hold that it was error for the courts below to dismiss the complaint for lack of jurisdiction. They took the position that § 3 First (i) of the Railway Labor Act conferred exclusive jurisdiction on the Adjustment Board because the case, in their view, involved interpretation and application of the collective bargaining agreement. But § 3 First (i) by its own terms applies only to *'disputes between an employee or group of employees and a carrier or carriers'*. This case involves no dispute between employee and employer, but to the contrary is a suit *by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining.* The Adjustment Board has no power under § 3 First (i) or any other provision of the Act to protect them from such discrimination." (Emphasis added.)

The Court then pointed out that "for this reason the decision in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, is not applicable here. The courts below also relied on *Hayes* v. *Union Pacific Ry. Co.*, 184 F.2d 337, cert. den. 340 U.S. 942, but for the reasons set forth in the text *we believe*

that case was decided incorrectly." (Footnote 4.) It should be noted that we also relied on the Hayes case for our holding in *Davis.*

Following this line of cases the Supreme Court of Texas held in 1958, in *Choate* v. *Grand International Brotherhood of Locomotive Engineers,* 314 S.W.2d 795, 798, that state courts had jurisdiction of a suit for determination of the validity of the union's application of a working agreement. This again was a suit by present employees against their bargaining representative, who contended that the subject matter lay within the exclusive jurisdiction of the N. R. A. B. The Court said:

> "It will be noted that the Act refers only to 'disputes between an employee or group of employees and a carrier or carriers'. *Controversies between railroad employees and their union are thus not included in the jurisdiction granted thereby.* * * * It is equally well settled, however, that both the state and federal courts may entertain a suit by railroad employees against their bargaining representative for a breach of the latter's statutory duty to represent all members of the craft fairly, impartially, in good faith and without hostile discrimination."

The Court said there was no basis for the distinction argued by respondents to the effect that the *Steele, Tunstall, Howard,* and *Conley* cases, *supra,* applied only to racial discrimination cases, saying "no basis for that distinction can be found in the opinions of the Supreme Court of the United States."

Also in 1958, the Federal District Court for the 2nd District of New York, decided *Cheries* v. *Brotherhood of Railroad Trainmen,* 167 F. Supp. 635. Again, the defendants sought to dismiss on the ground that the court lacked jurisdiction over the subject matter, and contended that

Conley, Howard, and *Steele* involved only racial discrimination. The Court said:

> "It is true that in each of these cases the invidious discrimination which the Supreme Court held violative of the provisions of the Railway Labor Act was directed against a class of employees because of their race. However, the language of the opinions does not in any way lead to the conclusion that only racial discrimination can be invidious. Indeed, discrimination, wholly apart from race, has been held to give rise to a federal cause of action."—(Citing the *Mount* and *Choate* cases, supra.)

As late as 1961, the Fourth Circuit had occasion to consider the question in *Hosteller* v. *Brotherhood of Railroad Trainmen*, 287 F.2d 457. It said:

> "It is well established that, under both the Railway Labor Act and the National Labor Relations Act, 29 U.S.C.A., § 151 et seq., a bargaining agent must fairly and without discrimination represent all employees in the bargaining unit, and that employees discriminatorily treated have recourse to the federal courts."—(Citing *Steele* v. *L. & N. Ry. Co.*, supra; *Tunstall* v. *Brotherhood, etc.*, supra.)

The Court then held that the acts complained of failed "to constitute arbitrary discrimination forbidden by law."

On the basis of the developments indicated by all of the foregoing cases, decided since the *Davis* case, we can but conclude that the Railway Labor Act was not intended to confer exclusive jurisdiction on the National Railroad Adjustment Board of cases involving disputes between employees and their bargaining representatives. This conclusion is strengthened in cases like the one before us, where discrimination is alleged, and where in certain circumstances the aggrieved employee might not receive any consideration by the Board.

We do not believe that the Supreme Court of the United States intended to open the doors to Negro employees who allege discrimination on account of race, and lock them to white or other employees who allege discrimination of other kinds.

We realize ours is, in the first instance, a divination contest to say in advance what the Federal Supreme Court will say later, but we are forced to conclude that our holding in the *Davis* case was incorrect and that the case at bar must be reversed. In so holding we, of course, express no opinion as to the merits of the same, but merely hold that it was error to overrule appellant's demurrers to the several pleas in abatement filed by appellees.

REVERSED AND REMANDED.

All the Justices concur except Stakely, J., not sitting.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
6th Div., No. 633,

E. H. MILSTEAD, Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY A CORPORATION ET AL., Appellee.

From Jefferson Circuit Court.

The State of Alabama, City and County of Montgomery,

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to eighteen inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in

the above stated cause, as the same appears and remains of record and on file in this office.

Witness, J. Render Thomas,
Clerk of the Supreme Court
of Alabama,
this May 10, 1962.

/s/ J. Render Thomas,
Clerk of the Supreme Court
of Alabama.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 8 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

Nos. 371 and 382.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

v.

E. H. MILSTEAD,
Respondent,

and

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN et al.,
Petitioners,

v.

E. H. MILSTEAD,
Respondent.

REPLY BRIEF

Of Respondent in Opposition to Petitions for Writ of Certiorari to the Supreme Court of Alabama.

WILLIAM M. ACKER, JR.,
Counsel for Respondent,
E. H. Milstead,

SMYER, WHITE, REID & ACKER,
618 Title Building,
Birmingham 3, Alabama,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX

	Page
Statement of the case	1
Reasons for denying the petition	4
Argument	5
The non-finality of the judgment of the Supreme Court of Alabama	5
Petitioners' reference to the fact that three out of four of the locomotive engineers who would be affected by the seniority change being sought are not before the trial court	13
Conclusion	14

Cases Cited.

Cohen v. Beneficial Industrial Loan Corp. (June 30, 1949), 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528	9, 10, 11
Conley v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 80	5
Davis v. Southern Railway (October 4, 1951), 256 Ala. 202, 54 So. 2d 308	5
Dibella v. United States (March 19, 1962), 7 L. Ed. 2d 614	9, 11
Georgia Railway and Power Co. v. Decatur (June 4, 1923), 262 U. S. 432, 43 S. Ct. 613, 67 L. Ed. 1065	5, 6
Montgomery Building & Construction Trades Council v. Ledbetter Erection Co. (December 8, 1952), 344 U. S. 178, 73 S. Ct. 196, 97 L. Ed. 204	7, 8
Pope v. Atlantic Coast Line R. R. Co. (April 27, 1953), 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094	8, 9

Radio Station WOW v. Johnson (June 18, 1945), 326 U. S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092, at page 2097 of 89 L. Ed. 12

Southern Pacific Co. v. Gileo (June 11, 1956), 351 U. S. 493, 76 S. Ct. 952, 100 L. Ed. 1357 ..... 6, 7, 9

Steele v. Louisville & Nashville Railway Co. (December 18, 1944), 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 13

Swift & Co. v. Compania Colombiana (June 5, 1950), 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206, 19 A. L. R. 2d 630 ..... 9, 11

Tunstall v. Brotherhood of Locomotive Firemen & Enginemen (December 18, 1944), 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187 13

Statutes Cited.

Title 28, § 1257, U. S. C. A. 4, 5, 8, 11, 14
Title 28, § 1291, U. S. C. A. 10, 11
Title 28, § 1292, U. S. C. A. 10

Textbook Cited.

6 Moore, Federal Practice (2d Ed. 1953) 113 11

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

Nos. 371 and 382.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

v.

E. H. MILSTEAD,
Respondent,

and

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN et al.,
Petitioners,

v.

E. H. MILSTEAD,
Respondent.

REPLY BRIEF

Of Respondent in Opposition to Petitions for Writ of Certiorari to the Supreme Court of Alabama.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

E. H. Milstead, the Respondent, by his attorney, respectfully opposes the petitions filed by Petitioners for a writ of certiorari to review the judgment of the Supreme Court of Alabama entered on May 10, 1962. Although the petitions were docketed separately in this Court, Respondent is treating them as consolidated because they are identical and involve the same cause in the Supreme Court of Alabama.

STATEMENT OF THE CASE.

Because Petitioners' statement of the case leaves out or de-emphasizes certain important procedural facts, and because it injects immaterial procedural facts, Petitioners' statement perhaps requires clarification and comment.

Petitioners suggest that Respondent's complaint now pending in the Circuit Court of Jefferson County is simply a request for an interpretation of the provisions of the collective bargaining agreement bearing on his seniority position as a locomotive engineer. This overlooks the significant factor which avoids the exclusive jurisdiction of the National Railroad Adjustment Board (hereinafter referred to as the N. R. A. B.). In truth, Respondent's complaint specifically charges that the Atlantic Coast Line Railroad Company (hereinafter referred to as the A. C. L.), the Grand International Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen purposefully and knowingly misapplied or ignored the pertinent provisions of the contract in order to deny Respondent his correct seniority. Fully recognizing the burden of proof which he is undertaking, Respondent charges that his employer and his own collective bargaining representatives have cooperated to discriminate against him without any reasonable basis for the discrimination, in other words, that they are guilty of hostile discrimination (for reasons of union politics), as opposed to realistic discrimination.

In stating the case, Petitioners spend considerable time discussing collateral proceedings, i. e., the A. C. L.'s purported submission to the N. R. A. B., and the injunction issued by the Circuit Court of Jefferson County enjoining the A. C. L. from proceeding with the said purported submission. It is interesting to note that the A. C. L. did not

decide to avail itself of what it now finds to be its inalienable right to have the dispute submitted to the N. R. A. B until the Supreme Court of Alabama had clearly held to the contrary. This purported ex parte submission of the controversy to the N. R. A. B. three years after Respondent had brought it to the Circuit Court of Jefferson County, directly in the face of the decision of the Supreme Court of Alabama, is an obvious maneuver designed to color the case for the purpose of this petition for a writ of certiorari, so as to "qualify" it in some back-door way. The only review here being sought is in one case from one decision of the Supreme Court of Alabama. The subsequent purported submission to the N. R. A. B. is entirely collateral and therefore immaterial. On its face it can have no bearing either on the question of reviewability or on the merits of the appeal. As far as the injunction suit is concerned, it is not even a part of the record. For that reason, there is certainly no need here to discuss it. If Petitioners sincerely feel that the injunction was erroneously granted, the proper procedures for its review are available.

The procedural posture of the only case upon which the instant petition is based, is not set out by Petitioners with full clarity. The reason for this omission can be quickly understood. The Circuit Court of Jefferson County (the trial court) initially decided that it did not have jurisdiction of Respondent's complaint. This decision was based upon the trial court's opinion that N. R. A. B. jurisdiction was exclusive over the subject matter. The Supreme Court of Alabama held that the Circuit Court did have jurisdiction. It therefore reversed and **"remanded"** the cause **"for further proceedings therein"** (R. 56, 66).

REASONS FOR DENYING THE PETITION.

This Court should refuse to grant both of the petitions for a writ of certiorari for either one of two reasons, viz.:

1. The decision of the Supreme Court of Alabama was not a final judgment or decree within the intendment of Title 28, § 1257, U. S. C. A., so as to confer jurisdiction on this Court.

2. The decision of the Supreme Court of Alabama was clearly correct and in conformity with the decisions of this Court.

ARGUMENT.

If the case were ripe for review, Respondent would have no fear of a full and fair consideration of the merits of the matter attempted to be presented, i. e., whether or not under the allegations of his complaint Respondent's exclusive remedy is with the N. R. A. B. In fact, Respondent would enjoy exploring with this Court the cases and authorities which convinced the Supreme Court of Alabama to overrule its own prior decision, **Davis v. Southern Railway** (October 4, 1951), 256 Ala. 202, 54 So. 2d 308. Respondent finds it hard to resist the temptation to expound upon (a) the purpose of the N. R. A. B. and its limitations of functions as conceived by Congress; (b) whether or not the Railway Labor Act provides an employee the equal protection of the laws; or (c) footnote 4 in **Conley v. Gibson**, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 80. But, these questions are, and must remain, academic until the jurisdiction of this Court is properly invoked so as to make these questions ripe for discussion.

The Non-Finality of the Judgment of the Supreme Court of Alabama.

Title 28, § 1257, U. S. C. A., limits the jurisdiction of this Court, insofar as the review of state court decisions is concerned, to "final judgments or decrees rendered by the highest court of a State." The tests for determining finality which have been laid down by this Court are exhaustively treated in Annotations to be found at 89 L. Ed. 1187, and 97 L. Ed. 208. There would be no purpose in here reviewing the whole line of decisions on the subject which are well presented in these Annotations. However, several of the cases do have peculiar applicability so as to warrant specific reference.

A good and concise statement of the pertinent proposition of law is found in **Georgia Railway & Power Co. v.**

Decatur (June 4, 1923), 262 U. S. 432, 43 S. Ct. 613, 67 L. Ed. 1065. At page 1073 of 67 L. Ed. this Court stated the rule as follows:

> . . . the rule is established that, in order to give this Court appellate jurisdiction, the judgment or decree "must terminate the litigation between the parties *on the merits of the case*, so that, if there should be an affirmance here, the court below would have nothing to do but execute the judgment or decree it had already rendered." Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73, 1 Sup. Ct. Rep. 15 and cases cited. (Italics supplied.)

In the instant case, the merits have never been considered. If the trial court had initially determined that it had jurisdiction of the subject matter, the litigation would have proceeded in logical sequence with a hearing on the merits before any appeal to the Supreme Court of Alabama. Under present circumstances, the only difference is that a consideration of the merits has been postponed because the trial court erroneously concluded that it did not have jurisdiction. Certainly Petitioners would not now be complaining in this Court before a consideration of the merits by the trial court if the trial court had ruled as did the Supreme Court of Alabama. The controversy will not end simply by the performance of a ministerial act by the trial court pursuant to an instruction of the Supreme Court of Alabama. The Supreme Court of Alabama remanded the case for further appropriate proceedings. Petitioners can still demur. If their demurrer is overruled, they can plead so as to deny or to confess-and-avoid the allegations. After that, they can try the case.

There could be nothing more tentative, or, to put it another way, nothing less final, than a simple determination that a Court has jurisdiction. This is well illustrated by two cases directly in point. The first case is **Southern**

Pacific Co. v. Gileo (June 11, 1956), 351 U. S. 493, 76 S. Ct. 952, 100 L. Ed. 1357. Southern Pacific petitioned this Court for a writ of certiorari on the following facts. A California trial court had ruled that it lacked jurisdiction of the subject matter presented by certain plaintiffs against Southern Pacific. The ruling was based on Southern Pacific's contention that the exclusive jurisdiction under the circumstances was with the Industrial Accident Commission under the California Workmen's Compensation Act. Before the appeal to the Supreme Court of California, the parties had not stipulated with respect to the issues of negligence and damages, i. e., the merits. At page 1363 of 100 L. Ed this Court held as follows:

> There were no trials of these issues, and, under California practice, the effect of the Supreme Court of California's unqualified reversal is to remand the cases to the trial court. See Gospel Army v. Los Angeles, 331 U. S. 543, 546, 91 L. Ed 1662, 1665, 67 S. Ct. 1428. *Since the issues of negligence and damages remain to be tried*, there is no final judgment in the highest court of the State, and this court, therefore, lacks jurisdiction to review . . . (Italics supplied.)

This case exactly parallels that of Respondent against Petitioners in the Circuit Court of Jefferson County. As in the instant case, the trial court found that exclusive jurisdiction was with another tribunal and therefore declined to hear the case. The highest court of the state ruled to the contrary, and remanded for consideration on the merits. There could be no better support for Respondent's contention that the instant decision by the Supreme Court of Alabama was not a final judgment.

The second case closely in point is **Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.** (December 8, 1952), 344 U. S. 178, 73 S. Ct. 196, 97

L. Ed 204. There an Alabama trial court granted a temporary injunction restraining a labor organization from peaceful picketing upon a finding that the picketing constituted a secondary boycott. The defendant union moved to dissolve the injunction on the ground that the National Labor Relations Board had exclusive jurisdiction over claims of secondary boycott. The Supreme Court of Alabama affirmed the trial court's denial of the motion to dissolve. After having first granted the writ of certiorari, this Court held that the writ had been improvidently granted because the decision of the Supreme Court of Alabama was not a final judgment. As in the case now before the Court, the decision by the highest reviewing court of the state was simply on a question of jurisdiction as between a state court and a federal administrative agency. This Court rightly concluded that the state court decision on this point provided no final determination under Title 28, § 1257, upon which review could be sought. In the parlance of the prize ring, "Round No. 1 is a far distance from the final bell."

Another case which aptly demonstrates that the decision of May 10, 1962, was not a final judgment is **Pope v. Atlantic Coast Line R. R. Co.** (April 27, 1953), 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed 1094. In that case, the A. C. L. had petitioned a Georgia court with *nisi prius* jurisdiction to enjoin its employee from prosecuting his F. E. L. A. claim in an Alabama court. The employee demurred on the ground that the F. E. L. A., a federal act, guaranteed him the right to sue at any place at which the A. C. L. did business. On appeal to the Supreme Court of Georgia, that court held that the employee's demurrer was not good. Thereupon, the employee petitioned this Court for a writ of certiorari. At page 1098 of 97 L. Ed. this Court considered the question of reviewability, as follows:

> The finality problem arises in the case because the judgment of the Georgia Supreme Court did not, on its

face, end the litigation. * * * *But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests on his federal claim and nothing more.* If the court below decided that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the federal question is the controlling question; "there is nothing more to be decided." (Italics supplied.)

Are Petitioners here freely conceding that Respondent's complaint is meritorious and would be decided in his favor if he successfully leaps the jurisdictional hurdle? If these petitions by Respondent's employer and his bargaining representatives had contained an admission of ultimate guilt, or if, as suggested in **Southern Pacific Co. v. Gileo**, *supra*, they had stipulated the damages, then they might claim the finality provided by the **Pope** cases. Under such circumstances Respondent would certainly have no quarrel over the question of finality.

Petitioners defer their consideration of the question of reviewability until the very end of their briefs, and then treat it only cursorily. Apparently realizing that their appeal is in the face of the overwhelming authority on the question of finality, they nevertheless rely upon **Cohen v. Beneficial Industrial Loan Corp.** (June 30, 1949), 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528; **Swift & Co. v. Compania Colombiana** (June 5, 1950), 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206, 19 A. L. R. 2d 630; and **Dibella v. United States** (March 19, 1962), 7 L. Ed. 2d 614. A careful examination of these cases fails to provide petitioners an honest foot-in-the-door.

In the **Cohen** case, *supra*, a stockholder had sued a corporation in a stockholder's derivative action in a federal district court in New Jersey. The New Jersey law required security by a minority stockholder under such cir-

cumstances to indemnify the corporation for its defense costs. The district court held that the said New Jersey law was not applicable in a federal court proceeding. The Court of Appeals accepted an appeal and reversed on this question. The question in this Court was the appealability of the original order overruling the corporation's motion to require security. This necessitated a construction of Title 28, § 1291, U. S. C. A., which grants to Courts of appeal jurisdiction of appeals from "all final *decisions* of the district courts of the United States" (Italics supplied). At page 1536 of 93 L. Ed. this Court made mention of the fact that Title 28, § 1292, allows appeals from interlocutory orders in the federal judicial system so as to indicate "the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties." On the same page, this Court continued as follows:

> It is obvious that if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.

Further the Court said:

> Nor does the statute permit appeals, even from fully consummated *decisions*, where they are but steps towards *final judgment* in which they will merge (italics supplied).

The **Cohen** case was not dealing with Title 28, § 1257, involved in the instant case. There is a great deal of obvious difference between a review by a Court of Appeals of a **federal** district court final **decision** and a review by the Supreme Court of the United States of a **state** supreme court final **decree** or **judgment**. If the distinction were not already apparent, the **Cohen** case would make it so. In addition, in the language of **Cohen**, decision on the question of jurisdiction is "but a step toward final judgment in which it will merge".

Swift & Co., *supra*, was an admiralty case brought in a federal district court with the attachment of a vessel as an ancillary procedure. The district court vacated the attachment. By construing Title 28, § 1291 as not precluding the review of the claim because fairly severable from the context of a larger litigious process, this Court agreed to review. But in stating its rationale at page 1210 of 94 L. Ed., the Court said as follows:

> Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible.

Again, Title 28, § 1257, was not being construed, either expressly or impliedly. Further, in the instant case, it could hardly be said that a review of the jurisdictional question after a trial on the merits would be an "empty rite" as in **Swift & Co.**

The **Dibella** case, *supra*, is cited by Petitioner A. C. L. at page 9 of its brief for the proposition that a decision by a state court in favor of its plenary jurisdiction is final as respects review by this Court. This proposition is belied by an examination of the case. Petitioner does not quote from **Dibella**, and for good reason. Not only does the case not involve Title 28, § 1257, but after the opinion outlines the exceptions to the strict rule of finality (such as mentioned in the **Cohen** and **Swift & Co.** cases), at page 618 of 7 L. Ed 2d, the Court says as follows:

> Despite these statutory exceptions to, and judicial constructions of, the requirement of finality, "the final judgment rule is the dominant rule in federal appellate practice." 6 Moore, Federal Practice (2d ed, 1953) 113.

The Court went on to find that the denial by a **federal** district court in a **criminal** case of a motion to suppress

certain evidence was not fairly **severable** from the context of a larger litigious process. The instant question arose 1. in a **state** court, 2. in a **civil** case, and 3. is **preliminary** and **basic**, rather than **severable** and **collateral**.

As good a way as Respondent can find to summarize the rule of finality for review of state court judgment, is to quote from **Radio Station WOW v. Johnson** (June 18, 1945), 326 U. S. 120, 65 S. Ct. 1475, 89 L. Ed 2092, at page 2097 of 89 L. Ed as follows:

> Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until litigation has been concluded in the court of first instance. (Citing cases.) This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. * * * *This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court.* Here we are in the realm of potential conflict between the courts of two different governments. And so, even since 1789, Congress has granted this Court the power to intervene in State litigation only after "the highest court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree." Section 237 of the Judicial Code, 28 U. S. C. A., § 344 (a), 8 F. C. A. title 28, § 344 (a). This requirement is not one of those technicalities to be scorned. It is an important factor in the smooth working of our Federal system. (Italics supplied.)

The italicized sentence in the above quotation clearly again distinguishes the cases relied upon by Petitioners, none of which involves the review of a state court decision.

Petitioners' Reference to the Fact That Three Out of Four of the Locomotive Engineers Who Would Be Affected by the Seniority Change Being Sought Are Not Before the Trial Court.

Although Respondent may be somewhat guilty of joining issue on the merits at this point, he prefers not to allow Petitioners' sweeping assertions about the effect of the absence of three out of the four locomotive engineers who would be "affected" by its claim to go completely unchallenged. Because all "affected" parties are not in court Petitioners jump to the conclusion that the basic philosophy of the Railway Labor Act would be emasculated if the cause proceeded to final judgment. This argument has already been heard and rejected by the Supreme Court of Alabama, which is the final word on the question of who are "necessary parties" in Alabama courts. In the first place, the Brotherhoods, which represent all employees, are formal parties to the suit. The particular employees who happen to be carried on the seniority roster ahead of Respondent are not necessary parties in the suit seeking declaratory relief. They were originally named gratuitously. Even if there should be a requirement that they be represented before the trial court, they are, in fact, represented as a class both by their own unions and by the party, C. C. Griggers, who is a fellow employee situated exactly as they are. Petitioners are here making technical small-talk. The clinching point in Petitioners' attempt to raise a Frankenstein is the point which impiedly appears in **Steele v. Louisville & Nashville Railway Co.** (December 18, 1944), 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, and **Tunstall v. Brotherhood of Locomotive Firemen & Enginemen** (December 18, 1944), 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed 187, where it was first held that an employee discriminated against is not required to go before the N. R. A. B. In those cases, this Court did not hesitate just because several thousand employees were

not formal parties to the suit, even though they most assuredly were affected by the decision which required that some employees not be discriminatorily treated. The obvious explanation is that the union, both technically and actually, represented all affected employees. Whenever a person is a victim of discrimination, there is someone who is taking advantage of it, and, therefore, someone who has a stake in its continuation. To eliminate the discrimination eliminates his advantage, and therefore indirectly affects him. But this certainly does not mean that he must be a formal party to a suit between the person discriminated against and the parties who are perpetrating the discrimination. As the Supreme Court of Alabama said in its opinion of May 10, 1962, Respondent did not name his fellow employees as parties defendant "because of a charge of personal misconduct." The four men indirectly affected are clearly not necessary parties. They were named as formal parties and could be eliminated tomorrow without injuring Respondent's cause of action.

CONCLUSION.

Respondent respectfully submits that Title 28, § 1257, U. S. C. A., does not clothe this Court with jurisdiction to grant the writ of certiorari requested, for the reason that the decision of the Supreme Court of Alabama is not a final judgment. Therefore, Respondent respectfully submits that the petitions should be denied. If, for any reason, Respondent is incorrect in his conclusion, and the Court should find that the judgment of the Alabama court will support an appeal, then Respondent respectfully submits that the opinion of the Supreme Court of Alabama, on a fair reading, without more, is so palpably correct as to require no correction or elaboration by this Court. If, however, a writ should be granted, Respondent respectfully

reserves and requests an opportunity to be heard on the merits.

Respectfully submitted,

WILLIAM M. ACKER, JR.,
618 Title Building,
Birmingham, Alabama,
Attorney for Respondent, E. H. Milstead.

SMYER, WHITE, REID & ACKER,
618 Title Building,
Birmingham, Alabama,
Of Counsel.

Certificate of Service.

I hereby certify that copies of the foregoing Reply Brief of Respondent in Opposition to Petitions for a Writ of Certiorari to the Supreme Court of Alabama, have been served upon Peyton D. Bibb, Esq., Attorney of Record for Petitioner, Atlantic Coast Line Railroad Company; upon E. T. Brown, Jr., Esq., Attorney of Record for Petitioners, the Grand International Brotherhood of Locomotive Engineers and C. C. Griggers; and upon Erle Pettus, Jr., Esq., Attorney of Record for Petitioner, the Brotherhood of Locomotive Firemen & Enginemen, by depositing the same in a United States mail box, first-class, postage prepaid, and properly addressed to them at their respective post office street addresses in the City of Birmingham, Alabama.

This the 6th day of October, 1962.

William M. Acker, Jr.

William M. Acker, Jr.,
As Attorney for Respondent, E. H. Milstead.